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No. 33.

IN THE

Supreme Court of the United States

OCTOBER TERM 1931.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al., Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

HENRY S. DRINKER, JR.,
Attorney for Appellees.

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v.

The Baltimore & Ohio Railroad Company, et al, *Appellees.*

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STATEMENT OF FACTS.

This proceeding involves the validity of the order of Interstate Commerce Commission, issued May 7, 1929, made retroactive to November 5, 1927, increasing from cents to 22 cents per 100 lbs. the division of Hoboken Manufacturers Railroad on raw silk, moved on through from the Pacific coast.

Hoboken Manufacturers Railroad Company, on whose tion the Commission made the order in question, is a

terminal or switching road in Jersey City, connecting with the trunk line roads and delivering carload freight received from them to the plants of the respective consignees.

In support of its contention that it was entitled to a larger division of the through rate on silk than the 5¼ cents per 100 lbs. which it had agreed on with the Trunk Lines, Hoboken Railroad presented on the first hearing before the Commission (November 22, 1926) testimony as to the cost to it of the service performed, which testimony is summarized in complainant's Exhibit 2 (Rec., p. 191) and is made up of four items:—

Switching	3.73
Terminal Insurance	11.25
Policing	1.25
Unloading and Delivery	6.00
Total Cost	22.23 cents per 100 lbs.

From complainant's testimony, it appeared that the two principal items of cost (Terminal Insurance, 11¼ cents, and Unloading and Delivery, 6 cents) were made necessary by reason of an arrangement which the Hoboken Company had made with the United States Testing Company, whereby the latter company performed, as agent for the Hoboken Company, the service of unloading the silk and delivering it to the consignees. On September 1, 1926, the Testing Company, whose business consists in testing and classifying raw silk preparatory to manufacture, had moved its plant from New York and located it on the line of the Hoboken Railroad. In contemplation of such move it had entered into the arrangement with the Hoboken Company above referred to (see Rec., p. 279), whereby all raw silk consigned for delivery on the Hoboken Railroad should be delivered at the warehouse of the Testing Company (a movement over the Hoboken Railroad of about two city blocks, p. 71), the latter to act as the agent of the Hoboken in unloading, checking, storing and delivering the silk to the consignees. For this service the Hoboken Company

agreed to pay the Testing Company 6 cents per 100 lbs. The Testing Company thus secured the advantage of having all this business dropped in its lap instead of having to depend, as theretofore (p. 119), on the silk being brought to it for testing by the respective consignees.

The arrangement with the Testing Company, according to the contention of the Hoboken Company, also made necessary the additional insurance charge of 11¼ cents. Although the insurance policies provided by the transcontinental lines on this silk hold for 48 hours after the arrival of the car at destination, such policies provided that in case of shipments to points of destination "other than New York" the insurance should terminate immediately on discharge of the railroad car (p. 173). Accordingly, when the Testing Company, as the agent for the Hoboken Company, unloads the silk at its warehouse, the transcontinental insurance ends, and, according to the contention of the Hoboken Company, it is required to provide additional insurance pending delivery to the consignee, at a cost of 11¼ cents per 100 lbs.

These two items, the 6 cents paid the Testing Company for unloading and delivery, and the 11¼ cents additional insurance, aggregate 17¼ cents or ½ cent more than the additional 16¾ cents awarded the Hoboken Company by the Commission.

The Testing Company having a manifest interest that the Hoboken Railroad secure a division which would enable it to pay the Testing Company's charges together with the additional insurance which its removal from New York made necessary, intervened and presented testimony.

The testimony offered at the original hearing before the Commission by the Hoboken Company (O'Neal, p. 68, Baker, p. 99, and O'Brien, p. 103) and by the Testing Company (Douty, p. 109, and Brown, p. 121) was confined to the character of the service performed by them respectively in switching this silk for the two City blocks from the Erie Junction point to the Testing Company's plant, with the alleged cost thereof. No testimony was offered

by either Company as to the cost of the service performed by the trunk lines from whose portion of the through rate the Commission was asked to take the 16¾ cents awarded to the Hoboken Company, although from plaintiff's testimony it appeared that the service rendered in the transportation of silk was extraordinarily expensive. (p. 113). It merely appeared that the total through rate was $9.00 per 100 lbs., of which the carriers east of the Mississippi (on whom the Commission imposed the payment of the additional 16¾ cents to the Hoboken) received in the aggregate 27½% or $2.47½. This rate was admittedly not one which had been "established pursuant to a finding or order of the Commission." O'Neal, the Vice-President and General Manager of the Hoboken Company, gave his estimate of the cost of lighterage across New York Harbor, including floating, unloading and delivery, policing and insurance, as 31 cents per ton, at which figure he calculated the cost which would be incurred to the roads other than the New York Central, if this silk, instead of being delivered to the Hoboken Company, were lightered across to New York (Rec., p. 82). The Secretary of the Hoboken Chamber of Commerce testified (p. 132) that in his opinion, the Hoboken Company was "an essential factor in the commerce and industry of Hoboken."

The above comprised all the testimony offered by complainant at the original hearing.

The evidence at the first hearing on behalf of the respondents comprised two sections; that offered on behalf of the roads west of the Mississippi, and that on behalf of the Eastern lines. The former (Toll, p. 132, and Gillette, p. 138) was in support of the contention that any additional division awarded the Hoboken Company should be absorbed by the Eastern roads by reason of the established practice of dividing all through transcontinental rates at the River, each group bearing the originating or delivery costs incurred in its portion of the haul. Examples were detailed in which additional delivery charges at the Pacific end were absorbed solely by the Western lines. The rec-

nue statistics offered by Toll, wholly general in form and not detailed as to separate carriers, furnished no means whatever for determining whether the transportation of silk by these defendants was profitable or otherwise, nor whether these defendants were or were not prospering and efficiently operated.

The testimony for the Eastern roads was confined to attacking the necessity and reasonableness of the alleged items of expense to the Hoboken Company for policing, terminal insurance, and unloading and delivery. These items of cost, it was contended, were the result solely of the unnecessary injection of the Testing Company into the situation, which, while clearly to the advantage of the latter, and perhaps also to the benefit of the silk manufacturers, might not properly be made the occasion for saddling the trunk lines with an additional expense of 16¾ cents. The witnesses for the eastern roads (Burt, p. 147, Ward, p. 157 and Wilson, p. 168), also described the nature of the service performed by the Hoboken Company, and compared its division with the switching charges on other similar freight over other switching lines.

No testimony was presented by either side relative to the "efficiency with which the [eastern trunk line] carriers concerned are operated, *the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation,* and the importance to the public of the transportation services of such carriers," * * * or to "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."[1]

On November 5, 1927, the Commission, pursuant to findings in an opinion based (as the Court below held) solely on the alleged need of additional revenue on the part of the Hoboken Railroad, and without any evidence or any

[1] Interstate Commerce Act, Sec. 15 (6).

finding or any reference whatever in the original opinion as to the cost of the service performed by the trunk lines, or their need of revenue, entered an order increasing the division of the Hoboken Company from 5¼ cents per 100 lbs. to 22 cents, which it directed the eastern lines to absorb in proportion to their existing divisions, without any contribution from the roads west of the River. This order the Commission made retroactive to August 6, 1926, the date of the filing of the complaint (213).

On February 20, 1928, this Court decided the case of Brimstone R. R. Co. *v.* U. S., 276 U. S. 104, holding void an order by the Commission changing divisions of through rates without evidence as to the matters prescribed in Section 15 (6) of the Act, and also stating that such a division order as to rates not theretofore prescribed by the Commission, might not, in view of the express terms of Section 15 (6), be made retroactive.

Accordingly, on May 14, 1928, the Commission, of its own motion, ordered a rehearing of the Hoboken case, which was held on July 13, 1928. At this rehearing, complainant undertook to make the record required in such a case by Section 15 (6), and introduced evidence intended to prove each of the items prescribed by the Statute (see Exs. 25-31),[2] and also introduced "tariffs and division sheets," "typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier," in the manner emphasized as necessary in the New England Divisions Case, 261 U. S. 184, 196, in U. S. *v.* Abilene & Southern Railway Co., 265 U. S. 274, 291, and in the Brimstone case, 276 U. S. 104, 117.

On this new record, the Commission on May 7, 1929, entered a new order, allowing the same 22 cent division to the Hoboken Company, but again making the order retroactive, this time to December 5, 1927 (thirty days after the date of the original order of November 5, 1927), in spite of the fact that the evidence necessary to sustain

[2] (Rec., pp. 326-339).

such order was not introduced into the record until long after such effective date (p. 355).

Commissioners Porter, Aitchison and McManamy disagreed with the majority on the ground that, even on the second Record, the evidence was too meagre to justify, under the Brimstone case, the conclusion that the eastern roads might "justly, reasonably and equitably," be required to bear the additional 16¾ cents awarded the Hoboken Company.

On February 4, 1930, the Commission made a further order, effective March 10, 1930, prescribing the same division for the future and confirming the orders of November 5, 1927, and May 7, 1929, with respect to shipments moving prior to March 10, 1930 (pp. 365-6).

On application to the statutory three-judge Court, the Commission's orders of November 5, 1927 and May 7, 1929, were annulled on the ground that the original order was invalid because made on a record which lacked the evidence specifically required by the Statute, and that the Commission, having obtained the requisite record subsequently, was powerless to revitalize the original order by a retroactive amendment thereof, made after the necessary testimony had been heard. From its examination of the evidence in the first record before the Commission the Court reached the following conclusion (p. 41):

> "The testimony offered at the hearing which preceded the original order of November 8, 1927, was narrow in its scope, and, as we view it, fell far short of a compliance with the terms of the act. It seems to have been based altogether, so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue and without any reference to the services performed by the trunk lines, or their condition, efficiency, and need of revenue. In other words, its point of view was essentially parochial, rather than all-embracing, as contemplated in the statute."

Speaking of the order of May 7, 1929, the Court said:

> "In this order also was incorporated a retroactive provision, making its terms effective as of December 5, 1927, despite the fact that the evidence necessary to support such order did not come into existence until the effective date had long since passed" (p. 42).

SUMMARY OF ARGUMENT.

The function of the Commission, in prescribing the just and equitable proportions of a joint through rate to be received by the respective connecting carriers, parties thereto, can be exercised only after the Commission has ascertained, by competent testimony, the revenue needs and the cost and nature of the service performed by all of such carriers.

Section 15 (6) of the Interstate Commerce Act specifically precludes the ordering of retroactive divisions except only in the case of joint rates previously established by the Commission (which this was not) and specifically requires, in every case where divisions are altered, that the Commission shall give due consideration to each of five specified considerations, including the efficiency with which all the carriers concerned are operated and the amount of revenue necessary to each to meet necessary expenses.

The original hearing before the Commission, to the date of which it attempted to make the order complained of retroactive, contained no testimony on which a finding could be based either (*a*) as to whether the Appellees (the connecting carriers other than the Hoboken) were operating their respective roads as a whole at a profit or at a loss, or (*b*) as to whether the shares of the particular rate in question, received by such connecting carriers, were reasonable, barely remuneratory, or less than the cost of service.

The Commission was clearly without power to make its later order retroactive to a date when it had given no con-

sideration whatever to the essential factors required by the Act.

At the second hearing, both the Examiner for the Commission and counsel for the Hoboken Company clearly indicated their recognition that the original record was fatally defective under the rule laid down in the Brimstone case.

An analysis of the New England Divisions, Abilene and Brimstone cases, as applied to the present case, clearly sustains the decision of the Court below.

The grounds on which the Appellants attempt to distinguish these cases are fallacious. The items of testimony now relied on by them as sustaining the sufficiency of the original record are insufficient for that purpose and were not even alluded to by the Commission in connection with the issue of its second and retroactive order.

The decision of the Court below should be affirmed.

ARGUMENT.

Brief Review of the Provisions of the Act Authorizing the Commission to Prescribe the Relative Divisions of Joint Through Rates.

The fundamental purpose of the Interstate Commerce Act was to enforce, for the benefit of the public, the duties which the law imposed on common carriers in consideration of the special powers and privileges which the law accorded them. This Act was not designed to regulate the contractual relations of the carriers as among themselves and the provisions having this effect, which were later introduced, were a mere incident to the primary purpose of protecting the shippers.

The original Act of 1887 (24 Stat. at L. 379) gave the Commission no power to require the carriers to agree on joint through rates or to prescribe the proportions in which they should divide a rate voluntarily agreed on between them. As the administration of the Act developed, it was found that the furtherance of efficient transportation required, in proper cases, the establishment of joint through routes and

rates between connecting carriers, and by the Amendment of 1906 (34 Stat. at L. 584, 589, Sec. 15) the Commission was given power to establish maximum through rates and joint rates and to prescribe the divisions thereof.

Manifestly, if the Commission was to impose a total joint through rate on two or more connecting lines, it was necessary to provide machinery for fixing the division thereof between the participants in case they could not agree. Such division, under a provision inserted by the Amendment of 1910 (36 Stat. at L. 539, 551) was left in the first instance to voluntary adjustment by the carriers, parties to the joint through rate so established, the Commission being given power to prescribe the "just and reasonable proportion of such joint rate to be received by each carrier party thereto" only after the carriers had failed to "agree among themselves upon the apportionment or division thereof."

Here, it will be noted, the function of the Commission was not to decide whether one of the carriers was of itself intrinsically entitled to more or less, but what was "the just and reasonable *proportion* * * * to be received by *each carrier* party thereto" out of the total rate prescribed by the Commission, which could be determined only by a consideration of the *relative* service and cost of all the participants and could obviously not be determined merely by considering the needs and service of but one of them.

The Amendment of 1920 expanded the provisions of Section 15 to its present form,[4] but preserved both its

[4] Section 15 (6)—Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation contemplated by such joint rates, fares, or charges, are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers parties thereto, in cases where the joint rate, fare, or charge [illegible] the Commission shall find that the [illegible] are found by it to be [illegible]

purpose and its basic limitations. The Commission was specifically directed, in prescribing the relative divisions of joint through rates, to give consideration to the relative service and revenue needs of *all* the participating carriers. It was authorized to make retroactive division orders only in the case of joint through rates which the Commission itself had prescribed, where obviously the Commission had already had before it all the factors relevant to the entire haul over all the participating roads.

There is no indication in the Act of any purpose to readjust, retroactively, the divisions voluntarily agreed on by two connecting lines, merely because one of them had thus undertaken to perform a service which cost it more than it had agreed to receive. Such carrier would be at liberty at any time to withdraw from the joint rate and to fix such local rate as it saw fit for its own service. If the interest of the public then required a joint through rate, the Commission was empowered to investigate the entire situation, prescribe a joint through rate, and fix the "just, reasonable and equitable divisions thereof."

The Commission was without power to make the order of May 7, 1929, retroactive to a date prior to findings by the Commission, based on competent testimony, as to the considerations prescribed by Section 15 (6).

Section 15 (6) of the Interstate Commerce Act, in defining the conditions under which the Commission is

reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their actual operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and shall not permit any participating carrier to use any unreasonable, or destructive rate, and any other fact or circumstance which would ordinarily, without regard to the situation of such carrier, be taken into consideration in determining the reasonableness of the joint rate, fare or charge (41 Stat. at L. 484, 489).

empowered to prescribe the division of joint rates between connecting carriers, places two express limitations on the power of the Commission.

(1) Where the joint rate under consideration is not one which has been established pursuant to a finding or order of the Commission, it may not make retroactive its order prescribing the divisions of such joint rate.

(2) In every case, in prescribing such divisions, the Commission is bound to give consideration to the efficiency with which *the carriers concerned* are operated, the amount of revenue required to pay their *respective* operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation and the importance to the public of the transportation services *of such carriers*, etc.

Both of these limitations were ignored by the Commission in its original order of November 5, 1927.

(1) The Commission made such division order retroactive to the time of the filing of the complaint, although the joint rates in question were not rates which had been established by the Commission.

(2) Without any evidence as to the service performed by the connecting carriers, their operating expenses or their need of revenue to secure operating efficiency, the Commission abstracted a part of their share of the joint rate (not of itself found to be unreasonably high) and gave such part to the Hoboken Company, merely because the latter appeared to be in need of more revenue.

The first of these errors the Commission purported to correct, after the rehearing, by making its new order effective thirty days after the date of its original order; the second error the Commission, as well as the Hoboken Company, also recognized, by taking elaborate testimony at the rehearing on all the matters prescribed by Section 15 (6) which had been omitted from the first record. Instead, however, of making its new order speak from a date thirty days after its findings, based on the new record containing the necessary testimony, the Commission made

it still retroactive, by dating it back to thirty days after the date of the first order, at which date the Commission had obviously heard and considered none of the essential testimony, and had made no findings based thereon evidencing its "due consideration" thereof.

Section 15 (6) requires that, in prescribing and determining the divisions of joint rates, each of the specified matters shall be given due consideration by the Commission, and that no retroactive order be made except in cases where the joint rate in question is one which the Commission itself has established by a prior order. Clearly to such "due consideration" it is essential first, that the Commission have before it, for consideration, competent testimony on the specified subjects; second, that such due consideration be evidenced by the making of findings based on the testimony so considered.[4]

At the Second Hearing both the Commission's Examiner and Counsel for the Hoboken Company clearly Indicated their Recognition that the Original Record was Defective.

The original record, on which was based the order of November 5, 1927, was restricted to testimony as to the nature of the service performed by the Hoboken Company, the cost to it of performing such service and its need of additional revenue. The service and revenue requirements of the connecting lines were wholly ignored. While such conclusion will be apparent, from a reading of the original record (pp. 63-216) it is conveniently demonstrable from the statements by the Examiner and by counsel for Hoboken Company at the second hearing. They all clearly recognized that the original record was fatally defective in failing to include competent testimony on the matters prescribed by Section 15 (6), and that the sole purpose of the rehearing ordered by the Commission after the Brim-

[4] See Chicago Junction Case, 264 U. S. 258, 265, quoted *infra*, note 6, p. 30.

stone decision, was to hear the necessary additional testimony.

Except for this no rehearing was necessary.

If all that was wrong was that the order of November 5, 1927, had been made retroactive to August 6, 1926, this could have been corrected by the Commission without any rehearing and without any additional evidence.

As has been stated, the occasion of the rehearing of this case, which the Commission ordered of its own motion on May 14, 1928, was the decision by this Court in Brimstone R. R. Co. *v.* U. S., 276 U. S. 104.[5] This decision annulled an order of the Commission modifying existing divisions between the Brimstone Railroad and its connecting lines, first, because such order had been based solely on evidence relative to the service cost and revenue requirements of the Brimstone, and without adequate testimony as to those of the connecting lines, and, second, because the order was made retroactive to the date of the original complaint, the joint rate in question not being one which had previously been established by order of the Commission.

At the opening of the rehearing in the case at bar, the Commission's Examiner made the following statement as to the purpose of the rehearing (pp. 216-217):—

> "EXAMINER SMITH:
>
> "Gentlemen, as I interpret the Commission's action in reopening this proceeding on its own motion for this rehearing, it is *my duty to obtain such a clean, clear record, that even the wayfaring man—though an attorney—need not err therein,* and, before all, is or is not this a case 'where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission'?
>
> "I understand that the joint rate on silk from Pacific Coast points to Hoboken, N. J., $9 per 100 pounds, was not so established; that it was, and is,

[5] This decision is reviewed at length, *infra*, pp. 25-28.

a carrier-made rate; and that the Commission's jurisdiction is fully described and conferred in Section 15 of the Act, paragraph (6) thereof, in the following terms:

"'(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers. * * * *In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.*'"

Pages 218 to 224 of the record at rehearing cover an attempt by the Examiner to summarize the testimony on the original record. It is significant that there is no reference whatever to the considerations presented by Section 15 (6) as applied to the connecting lines.

Again on page 229, after discussing with counsel certain facts and contentions which, with more or less success, he

thus endeavored to have stipulated, Examiner Smith made the following significant statement:—

> "EXAMINER SMITH:—In and to the extent now shown by your agreements, or exceptions, to the above statements made by me, the record ought to be nearly clear. As I see our work for the day—and this, gentlemen, is not to limit your procedure—merely my guess—we may direct our attention to:
>
> *"The matters required by the act;* and then to the measure of the divisions to be accorded complainant. * * *"

On page 256, Mr. L. D. Hawkins, a witness for complainant, being on the stand, Mr. McCollester, counsel for the Hoboken Company, made the following statement:—

> "MR. MCCOLLESTER:—Mr. Examiner, I should like to suggest, for the purpose of shortening the record, *and at the same time meeting the requirements of the law,* that so far as the stipulation may be binding upon the Commission, the complainants and defendants stipulate that they are each of them respectively efficiently operated, and are of importance to the public, and of such importance that their continued operation is in the public interest. We will stipulate that for the defendants if they will do the same for us.
>
> "MR. WESTLAKE:—It is so stipulated for those whom I represent.
>
> "MR. PIERCE:—And for the others.
>
> "EXAMINER SMITH:—And that is stipulated as a matter of fact as well as a matter of law."

The foregoing statements by the Examiner and by counsel for the complainant make it clear that the purpose and the recognized necessity for the rehearing was to remedy the defect in the original record, recognized after the announcement of the Commission's order in the Brimstone case for an exactly similar defect, by including competent testimony on the matters prescribed by Section 15 (6) (which

quirements the Examiner quoted in full at the opening of the rehearing), after due consideration of which and findings based thereon the Commission might then make a valid order, effective for the future. As heretofore stated, if the only defect recognized in the original order was its having been made retroactive, this could readily have been corrected without the necessity of any rehearing.

At the rehearing, complainant and the Examiner, between them, by stipulation with defendants or by competent testimony, endeavored to supply the previously absent items of proof. See especially Hawkins Exs. 25-30, pp. 325-338.

Both the Examiner and complainant's counsel having thus clearly regarded the prior record as defective because lacking testimony in the matters required by Section 15 (6) (enumerated at length by the Examiner at the beginning of the rehearing), counsel now contend that the original record did in fact contain adequate testimony on all these points. Were such the case, the rehearing was obviously unnecessary, since the Commission could, without hearing further testimony, have modified its order to eliminate the retroactive feature.

The Testimony from the Original Record now Relied on by Appellants to Support the Retroactive Order of May 7, 1929, falls far short of the Requirements of the Act.

In support of their present contention that the original record contained ample testimony to support findings on all the matters required by Section 15 (6), Appellants quote voluminous testimony relative to the character and cost of the service *performed by the Hoboken Company*, all of which is wholly besides the mark. What is lacking is testimony as to the character and cost of the service by the other Eastern carriers. The only items of such testimony relied on by Appellants are two, each of which can readily be demonstrated to be insufficient.

In support of his contention that any increased award to the Hoboken road be borne by the Eastern roads, Mr. Toll,

the representative of the Western roads, produced a table showing the relative gross and net *total* revenues of the Eastern, Southern and Western roads, the percentage of return of the roads in the Central Eastern region for 1925 and 1926 being 4.86% and 5.24% (Rec., p. 199). It is utterly impossible from this table to determine whether these defendants or any of them are operating their roads profitably or unprofitably, efficiently or otherwise. Nor would it have the slightest bearing on the determination as to whether 2.42½¢ per 100 lbs. was or was not an unreasonable amount for these defendants to receive for hauling silk in baggage cars at 100 miles per hour under special guard and insurance from the Mississippi River to Hoboken.

The second item of proof relied on, and now for the first time particularly stressed by both counsel is the testimony of complainant's superintendent O'Neal, which Appellants characterize as showing "that the Trunk Lines would benefit financially by the arrangement with the Hoboken, because Hoboken's service was a substitute for a service which had cost the Trunk Lines 31 cents per 100 lbs." (Brief for Interveners, p. 23.)

What O'Neal testified (pp. 79-82) was that when silk was to be delivered in New York City, the carriers *other than the New York Central*, who had no tracks into New York, were compelled to lighter it over from the Jersey side at a cost to these carriers which O'Neal "estimated"[4] at

[4] Doubtless one reason that this point has not heretofore been stressed is that, when O'Neal's testimony is examined, it will be found to be manifestly unreliable. It is built up on certain cost figures compiled by the Port Authority. Aside from how accurate may be the result, it is well recognized that the cost of lighterage and floatage service in New York Harbor includes such service throughout the entire hasbor area. Such service is inclusive of lighterage and floatage service performed on the Jersey side, as well as between the Jersey water front and Manhattan and Long Island. Obviously in a group adjustment it is improper to attempt to single out but one phase of service and assign to it an alleged cost calculated on the total service performed throughout the entire group area. The alleged saving effected by stopping the silk shipments of the Testing Company at Hoboken, instead of floating the cars across to Manhattan, would not in any event be the cost of water service measured throughout the entire New York Harbor, but in reality would represent a very small proportion of such cost.

31 cents per 100 [illegible] however, did not purport to represent any saving in the cost of delivery of silk in connection with shipments to points on the Hoboken road, but resulted, if at all, because the Testing Company moved its plant to a point within the rate group nearer to the point of origin. If the Testing Company had moved its plant to Philadelphia instead of to Hoboken, its move would have enabled the Pennsylvania and the Baltimore & Ohio to save the entire cost of the haul from Philadelphia to Hoboken, in addition to the supposed 31 cents, and would have added to the cost of the New York Central the expense of the haul from Hoboken to Philadelphia, as well as the cost of floatage from Manhattan to Hoboken. This, however, would have had no bearing on the reasonableness of the division between the Hoboken and these roads on silk actually hauled to Hoboken. Conversely, if the Hoboken railroad were located in Atlantic City and the Testing Company had moved there from Hoboken, the additional cost to the Trunk Lines in hauling the silk to Atlantic City would in no way tend to lessen the proper division to the terminal road. A switching road located at a junction at the near edge of a rate group cannot justify a higher division of the joint rate merely by showing that certain shippers, who previously got the long haul at the group rate, have now moved to points on the switching road nearer to the point of origin than formerly, thus saving the carriers the expense of the long haul. If such were true, the division of a switching road at the far end of the group would be cut down when it appeared that shippers had moved there from the near end, thus increasing the cost to the Trunk Lines in connection with their traffic.

Following this argument, if the Hoboken road were at Albany, it should get perhaps 40 cents for the same service. If it were at Atlantic City 5¼ cents might be excessive.

Also, the supposed 31 cents saving would admittedly not occur when the connecting line is the New York Central whose actual rail terminus is in New York City.

This supposed 31 cent saving to defendants, which was

not referred to [redacted] the Court below and which is now for the first time stressed on behalf of the Hoboken road, has no bearing whatever on the reasonableness of the relative shares of this joint rate receivable by the participating carriers.

Analysis of Decisions by this Court in the New England Divisions, Abilene and Brimstone Cases.

The question of law answered by the Court below in the negative and now brought to this Court for decision, is, therefore, whether the Commission, on the basis of additional testimony given at the rehearing, might thereby validate its prior order, as of a date 30 days after such original order, in spite of the absence of such necessary testimony, or of any finding based thereon, at the date of the entry of the order so validated.

It is submitted that such action by the Commission cannot be sustained without ignoring the express provisions of Section 15 (6) which prescribes the specific matters to which the Commission must give consideration prior to making a valid rate division order, and precludes the making of such an order retroactive except in the case of joint rates previously established pursuant to a finding and order of the Commission. Otherwise, it would follow that, whenever a complaint was filed asking for a modification of existing divisions of joint rates not established by order of the Commission, the latter could readily evade the prohibition against the retroactive order by issuing an early order prescribing the requested divisions, after a perfunctory hearing, which order, while presently ineffective, could be validated as of a date 30 days after its entry, if the Commission on subsequent hearing and consideration of competent testimony relative to the matters prescribed by the Act, concluded that the order so entered was justified by the subsequently taken testimony.

Three recent decisions by this Court so directly control the decision of the present case, as to make a consideration of other decisions unnecessary.

The first of them is the *New England Divisions Case*, 261 U. S. 184, which involved the divisions of all joint rates as between the New England roads and their connections. The original report by the Commission merely recommended an adjustment of the divisions (62 I. C. C. 513). Later, when no such adjustment was forthcoming, the Commission, after reargument, issued an order fixing such divisions. This order the Commission did not, however, attempt to make retroactive to the date of its original decision, but made the new order effective merely from thirty days after its own later date (66 I. C. C. 196). Both the District Court and this Court, in upholding such order by the Commission, prescribing increased divisions to the New England Roads, specifically found that the record before the Commission, on which the order was based, contained ample testimony to support it. Mr. Justice Brandeis said (p. 203):—

> "*Sixth.*—It is contended that the order is void, because it is unsupported by evidence. An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. I. C. C. *v.* Union Pacific R. R. Co., 222 U. S. 541, 547; Florida East Coast Rwy. Co. *v.* U. S., 234 U. S. 167. The rule must, of course, be the same in respect to an order fixing divisions. * * * That the evidence was ample to support the order made, is shown in the opinion of the lower Court, 282 Fed. 306, 308, 309, and in the reports of the Commission."

In the New England case this Court also proceeded on the theory (see p. 196) that the additional amounts awarded the New England lines were not abstracted from the connecting roads, but were obtained by the increase of 40% in the present rates which the Commission had ordered.

The Court (261 U. S. 184, 196) treated the action of the Commission as equivalent to what it would have been by a single order which had raised joint rates 40%,

and in the same order had declared that 90% of the whole increase in the joint rates should go to the New England lines in addition to what they would receive under existing conditions.

While in this case it was recognized that it was not necessary for the Commission, in case of a joint rate shared by a great number of connecting lines, to consider separately and at length testimony as to the service, cost and revenue requirements of each connecting road, nevertheless it was made clear that in such event, even where no part of the share of the connecting roads was taken from them for the benefit of the line needing the revenue, an order modifying existing divisions must be "based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier" (p. 196). See also 282 Fed. at p. 309.

This essential requirement has been emphasized in the discussion of the New England case, both in the Abilene (265 U. S. 274, 291) and in the Brimstone (276 U. S. 104, 117) decisions.

In the case at bar, there was no attempt, on the original record, to present any rate or division sheets for comparison with those here involved or any other testimony from which a finding might be made as to whether the silk traffic in question was carried on by these defendants at a profit or a loss. It merely appeared (from plaintiff's testimony) that the silk was "hurried across the continent at a very high rate of speed and at very large expense" (p. 113). There was no evidence from which the reasonableness of the $2.42¼ division of the other eastern lines could be determined; nor was there any testimony from which a conclusion could be reached that the proportions of the rate to which the Hoboken Company had agreed when it joined in filing it, were relatively "unjust, unreasonable or inequitable."

U. S. v. Abilene & Southern Railway Co., 265 U. S. [illegible] was an appeal from the Federal Court of Kansas,

enjoining the enforcement of an order of the Commission made pursuant to Section 15 (6) and relating to the division of interstate joint rates, within the United States, between the Kansas City, Mexico & Orient system and thirteen connecting carriers. The order provided that on all such traffic the existing divisions of these connecting carriers should be reduced by fixed percentages, and that the Orient should receive the amounts so taken from the connections (73 I. C. C. 319, 329).

The finding of the Commission that the Orient was in need of additional revenue and that its share of the joint rates in question was unremunerative, was apparently based on competent evidence in the record before the Commission, but the conclusion that the increased division to the Orient might properly be taken from the shares of the connecting lines was *based on the annual reports* of such lines in the files of the Commission, which it considered without introducing them into the record.

This Court, affirming the Court below, held that the Commission may not thus base a necessary finding on data not offered in evidence, though contained in its files, however authentic such data may be.

The Court on page 284 summarizes the matters prescribed by Section 15 (6) as necessarily proved in this particular case to authorize the Commission to make a valid order modifying the divisions of joint rates, and points out that the annual reports had been used by the Commission as evidence of facts deemed by it thus "necessary to prove," and not merely "as a means of verifying facts of which the Commission, like a Court, takes judicial notice" (p. 287).

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made." * * *

"The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted * * * (p. 289).

"The order must, therefore, be held *void*" (p. 290).

The Court also apparently sustained the carriers' Fifth objection to the order, which objection was based on the fact that the record before the Commission did not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, or any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates, pointing out that tariffs and divisions should be in the record which, in the opinion of the Commission, are typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier, as was done in the New England Divisions case.[7]

Both grounds for the above decision are directly applicable in the case at bar. The original record before the

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[7] In the Abilene case the Court below (288 Fed. 102) made the following significant statements in the course of the opinion:—

"The Transportation Act discloses no intention to vest the Commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it" (p. 113).

"In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self sustaining and needs help; but we cannot assent that the Commission is empowered to compel prosperous roads, because they are prosperous, to contribute their services to the sustenance of weak roads, because they are weak" (p. 114).

The above would be strikingly applicable to the present case if, by the first record in the case at bar, it had appeared that the connecting lines were prosperous. The case at bar is even stronger against the validity of the order, since the record on which it was necessarily based lacked the essential evidence as to the prosperity or otherwise, of the roads from whom the Commission abstracted the 16½ cents for the benefit of the Hoboken Railroad.

Commission in the present case contained no data whatever on which might properly be based any finding as to the operating efficiency, the cost of service, the financial needs or the operating return of the carriers from whom was abstracted the 16¾ cents awarded the Hoboken, or any basis for a finding that the divisions of the rate on which they had voluntarily agreed were relatively "unjust, unreasonable, inequitable or unduly preferential or prejudicial" as between them so as to require that they might "justly, reasonably or equitably" be called on to surrender to the Hoboken such part of their revenue. Neither the original record before the Commission, nor the second record on rehearing, contained any tariffs or division sheets which might be said to be "typical in character" or "ample in quantity" to justify a finding in respect to the division of this particular rate among these carriers. If the Commission made any such determination and did not merely conclude that the Hoboken needed more money, such determination was based on what it knew or ascertained outside the present record.

The third case referred to is that which prompted the rehearing by the Commission of its own motion in the case at bar, *Brimstone R. R. Co.* v. *U. S.*, 276 U. S. 104, decided February 20, 1928. This was an appeal by the Brimstone Railroad from a decree of the Court below sustaining the order of the Commission, which order required the Brimstone road to surrender a part of its division of joint rates to its connecting lines.

The evidence before the Commission was directed solely to the excessiveness of the return to the Brimstone road, the contention being that this was in the nature of a rebate to the Union Sulphur Company, which owned all its capital stock and furnished more than 90% of its traffic (276 U. S. 111). This evidence is thus summarized on page 113 of the report:—

> "Testimony was taken relative to ownership and organization of the Brimstone Company; its relation

to Union Sulphur Company; its operating and financial condition, including dividends, surplus, and character of service performed; volume of road-building material carried for Parish purposes; establishment by United States Railroad Administration of divisions with connecting lines, with factors considered in connection therewith; comparison between the questioned divisions and those received by other lines in the same territory; also value of operating property, including cost of reproduction."

The Commission's order was made retroactive to the date of the filing of the complaint.

This Court thus states the two grounds on which the validity of the order was objected to (p. 109):—

"1. The Commission failed to investigate or determine the reasonableness or justness of the divisions, or whether they were unjust, unreasonable, inequitable, or unduly preferential or prejudicial, as between the carriers; also failed to consider whether the circumstances entitled one to a greater or less proportion than another of the joint rates, as commanded by Section 15 (6), Transportation Act, 1920. (41 Stat. c. 91, p. 456).

"2. The joint rates were agreed upon by the parties and not 'established pursuant to any finding or order' of the Commission, within Section 15 (6), Transportation Act, 1920. Consequently, the Commission had no power to require adjustments for any period prior to the final order."

In summarizing the prior general investigation by the Commission, which included the joint rates in question (on which the Commission based its contention that such rates were "established" by it, justifying a retroactive order) the Court pointed out that in such investigations "no studies were made or evidence taken concerning efficiency

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[58] 1 C. C. C. 220; 68 I. C. C. 676; 88 I. C. C. 62.

of Southern Pacific and Kansas Southern lines, amount of revenue required to pay their respective operating expenses, taxes, and fair return upon their property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15 (6)" (p. 114).

On pages 115-116 the Court said:—

> "The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers.'
>
> "Counsel suggest that in addition to facts revealed by studies of the Brimstone Company's affairs, the Commission did consider existing division sheets of joint rates, volume and distribution of traffic, past division sheets, divisions accorded to the Brimstone Company by the Federal Director-General, also testimony showing competition controlled the agreed divisions. But the very definite command of Section 15 (6) required more than that."

The case at bar is stronger, for here there were no such division sheets for comparison.

The Court then discusses the New England Divisions and Abilene cases. Of the former it says (p. 116):—

> "Nothing in the opinion supports the view that the Commission may take something from one carrier merely because its net revenue appears unduly large and donate this to another demanding nothing and not in

need. Cost of service to one carrier is not the only factor to be considered in determining just divisions."

The Abilene case is thus summarized (p. 116-117):—

"In the second case the Commission undertook to modify existing divisions for the benefit of a weak road. It did not appear that any matters consideration of which was required by Section 15 (6) Transportation Act, 1920, had been ignored, but the evidence concerning some of these things had not been properly presented and therefore the order was annulled. It was there said: (284) 'Relative cost of service is not the only factor to be considered in determining just divisions' (291). 'The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the New England Divisions Case, tariffs and division sheets were introduced which, in the opinion of the Commission were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.'

"The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15 (6). And it must be annulled."

On the second point (the power to make the order retroactive to the date of the complaint) the Court held in the Brimstone case that the orders issued in the general investigations did not amount to the establishment of specific rates within the meaning of Section 15 (6) so as to bring the case within the exception permitting a retroactive division order.

The Brimstone case, while the converse of the case at bar, is controlling in principle. There it was held that the Commission is without power to take from one road receipts supposed to exceed a fair return and award them to connecting lines without evidence that the latter were in need of additional revenue or that the joint rates themselves were unfair or unjust or that the agreed divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers."

In the case at bar the Commission was equally without justification, merely because the Hoboken Company was believed to require additional revenue, to abstract the required sum from the connecting lines "without evidence tending to show that they * * * had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust [because too low] or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers'" (see 276 U. S. 104, 115).

Again, to paraphrase the Court's summary of the basis of its prior decision in the New England Divisions Case (quoted *supra*, pp. 27-28):—

> Nothing in the opinion supports the view that the Commission may donate something to one carrier merely because its net revenue appears unduly small and take this from another not shown to be unduly affluent. Cost of service to one carrier is not the only factor to be considered in determining just divisions.

It will be noted that in the decisions by this Court above summarized, the Court holds that where the Commission

has issued an order without evidence before it necessary to support the same, such order is *void*.[9] Obviously, a void order cannot be vitalized as of its original date by virtue of evidence later introduced.

Appellants' Attempt to Distinguish the Foregoing Cases.

Appellants now attempt to distinguish the above cases on the ground that they involved general divisions of rates on all freight, while this is the first division case involving a rate on a single commodity. In the first place, however, the Brimstone case was primarily one involving the division of rates on sulphur from the Union Sulphur Company mines, since the tonnage of the Brimstone road (as its name indicates) was virtually restricted to products of the Union Sulphur Company, which furnished 90% of its traffic. The reason for the Commission's proceeding against the Brimstone road was that its large division was in the nature of a rebate, this referring obviously to the rate on sulphur which was paid by the Union Sulphur Company.

The Act, in requiring consideration by the Commission of the specified items of testimony makes no distinction between cases involving rates generally and those involving a single rate on a single commodity.

If it costs the Hoboken road more than $21.00 per car (5¼¢ per 100 lbs.) to switch these cars two blocks from

[9] See also Chicago Junction Case, 264 U. S. 258, 265, where this Court, in discussing an order of the Commission found to have been unsupported by necessary testimony said:—

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence *and the duty of deciding in accordance with it.* To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and *since such an order is void*, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

the Erie interchange point to the warehouse of the Testing Company, this might justify an additional charge to the shipper, but cannot of itself justify the abstraction of $67 per car from the amount received by the Eastern roads as their share for hauling the silk from the Mississippi to the junction with the Hoboken. There is no testimony whatever on which to base a finding that the share of this joint rate received by defendants is excessive, or that it constitutes more than a fair return for the exceptional service rendered. If (as must be assumed from the Hoboken's agreement to this share when the joint rate was voluntarily established) such share is but a reasonable return for the service rendered, or represents an equitable proportion of the total, no part of it can properly be abstracted merely to give the Hoboken road a reasonable return for its switching service. To do so would be robbing Peter to pay Paul.

Many through rates on specific commodities are unremunerative to the participating carriers. In the case of such a through rate, all the participants must share the loss in equitable proportions.

While doubtless the testimony proper to justify the modification of divisions on a single commodity might differ from that proper in a case involving rates generally, there is nothing in the Act to warrant the contention that its plain requirements are to be ignored in a case like the present. The record on which its order complained of was based contained nothing from which the reasonableness of the $2.42¼ could be determined. All that appeared was that the service was unusually expensive, involving high speed, special guards, and extraordinary insurance.

Appellants make the extraordinary contention that while the aggregate reasonableness or unreasonableness of an entire rate schedule can be determined, it is impossible to determine the reasonableness or unreasonableness of a rate on a single commodity. But this is just what the Commission has been doing dozens of times each week for

the last forty-four years. It was entirely possible for the Commission, on a proper record containing adequate testimony, to determine whether the share of this rate received by the eastern trunk lines was unreasonable, because out of line with other similar divisions; also to determine in what proportions the rate should fairly be divided. But neither determination could be reached merely on evidence of the facts at but one end of the haul and without knowing whether the total rate to be equitably divided was unusually profitable, barely compensatory, or forced down by competition to a point so low as to be unremunerative to all participants. It is obviously impossible to determine the fair, just, and equitable division of anything merely by ascertaining the needs of one participant, awarding to him sufficient to satisfy such needs, and giving to the others what is left.

It is further suggested in the brief of the United States that a hearing has been held and the carriers given an opportunity to present testimony that their share of the joint rate was not excessive, and that since they have failed to do so, it must be assumed that the facts are as complainant would have them. This contention not only ignores the express requirements of the Act, but is contrary to the practice in all rate cases. When a shipper sues to have an alleged excessive rate reduced, has it ever been held that the burden is on the carrier to show that its rate is not exorbitant merely because the carrier is presumably in a better position than the complainant to produce the proper testimony pro and con? On the contrary, it has been expressly held that even the shipper, for whose protection the Act was passed, has always the burden of proof, save only in the case of rates increased after 1910, the specification of which exception by Congress merely serves to emphasize the general rule. If a shipper, by proof that he cannot afford to pay more, may not throw on the carrier the burden of proving a rate reasonable, is it to be assumed that Congress intended a fellow-carrier to be more paternalistically protected?

That no such extraordinary exception is to be read into the law as applied to division cases is clear from the decision of this Court in the Abilene and Brimstone cases, holding that the evidence required by the Statute could not be supplied by the Commission's referring off the record to the carriers' annual reports, or by the Commission's general knowledge.

The gist of Appellants' present argument is that when a switching road shows that its service costs it more than its agreed division, it thereby throws on the connecting lines the burden of proving that the share receivable by them is also "confiscatory," and that unless they can sustain such burden they must give up to the switching road enough to make its share compensatory. The statute contains no basis for such a contention. The history of the Act, as well as common sense, sustains the contrary presumption that the divisions of a joint rate, agreed on by the participating carriers, are relatively just and reasonable.

Conclusion.

It is therefore respectfully submitted that the order of May 7, 1929, which purported to modify that of November 5, 1927, so as to make the latter effective December 5, 1927, was wholly void and was properly annulled by the Court below, whose judgment should be affirmed.

Respectfully submitted,

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